Filed 3/13/19 In re Victor L. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re VICTOR L. et al., Persons Coming Under the Juvenile Court Law.	B292176 (Los Angeles County Super. Ct. No. DK08750)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. GERARDO L., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Robin R. Kesler, Juvenile Court Referee. Affirmed.

Neale B. Gold, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine Miles, Assistant County Counsel, and Stephen D. Watson, Deputy County Counsel, for Plaintiff and Respondent.

Gerardo L. (Father) appeals from an order under Welfare and Institutions Code section 366.26[1] finding his children to be adoptable and terminating his parental rights. On appeal, Father contends there is not substantial evidence to support the juvenile court's finding by clear and convincing evidence that the children were adoptable. We affirm.

BACKGROUND

Father and Angela A. (Mother)[2] are the parents of four children: Victor L., now 12 years old, 11-year-old Jasmine L., nine-year-old Andy L., and eight-year-old Emily L. The Department of Children and Family Services (DCFS) filed the original section 300 petition as to the children on December 17, 2014. It alleged that due to Father's alcohol abuse and unsanitary conditions in the home, the children were at risk of

---

[1] All further statutory references are to the Welfare and Institutions Code.

[2] Mother's oldest child, 19-year-old Jerry L., was named in the original section 300 petition but is no longer subject to the juvenile court's jurisdiction. Neither he nor Mother is a party to this appeal.

serious physical harm or illness (*id.*, subds. (b), (j)). More specifically, DCFS alleged that Father and Mother were unable to provide appropriate care and supervision for Victor, Andy, and Emily, who had mental and emotional problems.

Victor, Andy, and Emily were receiving regional center services. Victor had been diagnosed with a mild intellectual disability and was developmentally delayed. In addition to a learning disability, he had speech and language impairment. Andy had Down Syndrome, was developmentally delayed, was unable to communicate, and displayed aggressive behavior. Emily was developmentally delayed and unable to speak. Although Jasmine was not a regional center client, she was having difficulty in school; DCFS recommended that she receive an educational assessment.

A first amended petition filed on February 19, 2015, added allegations of physical abuse by Mother and Father (§ 300, subd. (a)). At the jurisdiction/disposition hearing on March 9, 2015, the juvenile court sustained the first amended complaint as amended, declared the children to be dependents of the court, and removed them from the parents' custody. The court ordered reunification services and visitation.

Victor, Jasmine, Andy, and Emily were placed with foster parents, Alejandro and Reyna R. (the Rs), who had been trained to care for special needs children. The children had strong emotional bonds with one another. The Rs provided a safe, clean environment for the children. The regional center provided the Rs with 16 hours of respite care per month for each of the three children who were clients, and the Rs also had a child care provider to assist them. All four children were doing well in the Rs's care.

The section 366.22 permanency review hearing was held on October 19, 2016. The juvenile court terminated reunification services. It ordered DCFS to assign an adoptions worker and initiate an adoptive home study. It set the section 366.26 permanency planning hearing for February 15, 2017.

DCFS recommended that the court find the children likely to be adopted. The adoptions children's social worker (ACSW) noted that the Rs loved the children and wanted to adopt them. Victor, Jasmine, and Emily stated that they wanted to be adopted by the Rs. The Rs lived in San Bernardino County, so the ACSW had referred them to the San Bernardino County Children and Family Services for the completion of an adoptive home study. As of February 15, 2017, the study had not been completed.

In an August 16, 2017 status review report, DCFS noted that an adoption assessment had been completed; DCFS continued to recommend adoption as an appropriate plan for the children. In its discussion of the children, DCFS stated that Victor was very immature for his age; he tended to fight with the other three children over toys and throw tantrums when he did not get what he wanted. Jasmine presented quiet and shy; she had difficulty making friends. Andy was non-verbal and like a baby, requiring constant care; he still acted aggressively if he did not get what he wanted. Emily was happy and active.

The ACSW stated that the home study was expected to be completed by October 9, 2017. The Rs had completed their criminal clearances and submitted most of the required documentation. The San Bernardino County Children and Family Services reported that only Reyna R. would be completing the family assessment and proceeding with the adoption. Alejandro R. removed himself from the assessment, and would

provide a spousal waiver so that Reyna R. could proceed with the adoption on her own. However, he expressed his continued support for the children.

On November 15, 2017, the ACSW reported that the home study had not been completed. San Bernardino County Children and Family Services was still gathering documentation regarding Alejandro R. and another resident in the home. The ACSW had no reason to believe the home study would not be approved, since the Rs were fully licensed as a foster family by Los Angeles and San Bernardino counties.

As of February 14, 2018, the situation remained unchanged. On May 16, 2018, DCFS reported that the adoptive home study had been approved on April 4. However, because there were six children living in the Rs's home, and it had only been approved for four, DCFS was looking to get an exception approved. The Supervising CSW approved the home for adoptive placement on June 21.

On August 15, 2018, DCFS reported that Reyna R. and the children had moved to a new home, with plenty of room for the children and a large backyard. The home was clean and free from safety hazards. DCFS continued to recommend adoption by Reyna R.

The section 366.26 permanency planning hearing occurred on August 20, 2018. Father was not present at the hearing. He had been hit by a car and was hospitalized. He did not know when he would be released, and he authorized his attorney to proceed without him.

Father's attorney argued that the court should not terminate his parental rights based on the exception provided in section 366.26, subdivision (c)(1)(B)(1): that Father had

maintained regular visitation and contact with the children and "the children would benefit from continuing to have a relationship with him." Counsel requested that the court "consider granting a guardianship instead of terminating parental rights, as it would be less destructive to the family and would allow the [children] to maintain a relationship with their father. Legal guardianship is just as effective and stable as adoption."

The juvenile court found "by clear and convincing evidence that these children are adoptable. They are in an adoptive placement and have been for quite some time. They have expressed a desire to be adopted by the current caregivers, and they are approved for the adoption purpose. [The c]ourt does not find any exception to the adoption requirement." The court terminated Mother and Father's parental rights and declared the children free from their parents' custody. It transferred custody to DCFS for adoptive planning and placement.

Father timely appealed.

DISCUSSION

I. Father Did Not Forfeit His Challenge to the Sufficiency of the Evidence To Support the Finding of Adoptability

DCFS contends that Father forfeited the right to challenge the sufficiency of the evidence supporting the finding the children were adoptable by failing to raise the issue below. We disagree.

In re Crystal J. (1993) 12 Cal.App.4th 407, on which DCFS relies, involved assessment reports prepared for the selection and implementation hearing; these reports addressed the subject of

adoptability. The mother did not challenge these reports at the hearing. On appeal, she challenged the adequacy of the reports. The court, citing 9 Witkin, California Procedure (3d ed. 1985) Appeal, section 307, page 317, and section 311, page 321, stated: "We note that no objection to the sufficiency of the assessment reports was made at time of trial, and refer to the familiar principle that failure to object to the admission of improper or inadequate evidence waives the right to raise the issue on appeal. [Citation.] If the complaint on appeal be deemed not the admissibility, as such, of inadequate assessment reports, but substantive insufficien[c]y to establish requisite findings, this complaint, too, was waived by failure to raise it at the trial level. [Citation.]" (*Crystal J.*, *supra*, at pp. 411-412, fn. omitted.)

However, in *In re Brian P.* (2002) 99 Cal.App.4th 616, the court stated its belief that "the *Crystal J.* court overstated the scope of the waiver doctrine." (*Id.* at p. 623.) The court explained: "When the merits are contested, a parent is not required to object to the social service agency's failure to carry its burden of proof on the question of adoptability. (See *In re Chantal S.* (1996) 13 Cal.4th 196, 210 . . . [agency has burden of presenting evidence to support allegations and requested orders]; *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 254 . . . .) 'Generally, points not urged in the trial court cannot be raised on appeal. [Citation.] The contention that a judgment is not supported by substantial evidence, however, is an obvious exception to the rule.' (*Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 23, fn. 17 . . . ; see also *In re Joy M.* (2002) 99 Cal.App.4th 11 . . . ; *Robison v. Leigh* (1957) 153 Cal.App.2d 730, 733 . . . .) Thus, while a parent may waive the objection that an adoption assessment does not comply with the requirements

provided in section 366.21, subdivision (i), a claim that there was insufficient evidence of the child's adoptability at a contested hearing is not waived by failure to argue the issue in the juvenile court." (*Brian P.*, *supra*, at p. 623; accord, *In re Gregory A.* (2005) 126 Cal.App.4th 1554, 1561.)

We agree with *Brian P.* that the sufficiency of the evidence to support a finding of adoptability—as opposed to challenges to the adequacy of an adoption assessment report—is not forfeited by the failure to object to the report. Accordingly, we turn to the merits of Father's challenge to the sufficiency of the evidence.

II. Standard of Review and Applicable Law

"A juvenile court may terminate parental rights only if it determines by clear and convincing evidence that it is likely the child will be adopted within a reasonable time. [Citation.] The 'likely to be adopted' standard is a low threshold. [Citation.] On review, ' "we determine whether the record contains substantial evidence from which a reasonable trier of fact could find clear and convincing evidence that [the child] was likely to be adopted within a reasonable time. [Citations.]" [Citations.] We give the court's finding of adoptability the benefit of every reasonable inference and resolve any evidentiary conflicts in favor of affirming. [Citation.]' [Citation.]" (*In re J.W.* (2018) 26 Cal.App.5th 263, 266-267; accord, *In re Brian P.*, *supra*, 99 Cal.App.4th at pp. 623-624.)

As Father observes, "There is a difference between a child who is generally adoptable (where the focus is on the child) and a child who is specifically adoptable (where the focus is on the specific caregiver who is willing to adopt). [Citations.]" (*In re J.W.*, *supra*, 26 Cal.App.5th at p. 267.) A child is generally

adoptable if the child's age, physical condition, mental state, and other factors make it likely that the child will be adopted within a reasonable time by either a prospective adoptive family or another family. (See *In re I.W.* (2009) 180 Cal.App.4th 1517, 1526; *In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649-1650.) A child is specifically adoptable " 'where the child is deemed adoptable based solely on the fact that a particular family is willing to adopt him or her . . . .' " (*In re I.W.*, *supra*, at p. 1526; accord, *In re J.W.*, *supra*, at pp. 267-268.)

Where a child is specifically adoptable, our " 'analysis shifts from evaluating the characteristics of the child to whether there is any legal impediment to the prospective adoptive parent's adoption and whether he or she is able to meet the needs of the child. [Citation.]' [Citation.]" (*In re J.W.*, *supra*, 26 Cal.App.5th at p. 268.) That there is a prospective adoptive parent " 'is evidence that the child's age, physical condition, mental state, and other matters relating to the child are not likely to discourage others from adopting the child.' [Citation.] [¶] In other words, '[w]hile, generally, the present existence or nonexistence of prospective adoptive parents is, in itself, not determinative, it is a factor in determining whether the child is adoptable.' [Citation.] As one court has explained, 'in some cases a minor who ordinarily might be considered unadoptable [because of] age, poor physical health, physical disability, or emotional instability is nonetheless likely to be adopted because a prospective adoptive family has been identified as willing to adopt the child.' (*In re Sarah M.*[, *supra*,] 22 Cal.App.4th [at p.] 1650 . . . .)" (*In re I.W.*, *supra*, 180 Cal.App.4th at p. 1526.)

III. Substantial Evidence Supports the Juvenile Court's Finding that the Children Were Adoptable

We begin our analysis with the recognition that the four children were a bonded sibling group and all had significant physical, developmental, and/or emotional problems. For these reasons, they were not generally adoptable. (See *In re B.D.* (2008) 159 Cal.App.4th 1218, 1232-1233.)

Nevertheless, all four children were together in a prospective adoptive home. Reyna R. had been approved as their adoptive parent, and the children who were able to express a preference wanted to be adopted by her. "It is well established that if a child has special needs which render the child not generally adoptable, a finding of adoptability can nevertheless be upheld if a prospective adoptive family has been identified as willing to adopt the child and the evidence supports the conclusion that it is reasonably likely that the child will in fact be adopted within a reasonable time. [Citations.]" (*In re K.B.* (2009) 173 Cal.App.4th 1275, 1292.)

In arguing that there is no substantial evidence of adoptability, Father points to the delays in approval of the adoptive home, that Alejandro R. removed himself from the adoption assessment, and that an exemption was needed to allow all four children to be adopted. While there were delays in obtaining the approval, Reyna R. ultimately obtained both the approval and the exemption. The record does not specify what the problem was with Alejandro R.'s approval as an adoptive parent. However, he had been licensed as a foster parent in both Los Angeles and San Bernardino counties, and neither DCFS nor the San Bernardino County Children and Family Services

expressed any concern that his presence would create a risk to the children.

" ' "[I]t is only common sense that when there is a prospective adoptive home in which the child is already living, and the only indications are that, if matters continue, the child will be adopted into that home, adoptability is established. . . ." ' [Citation.]" (*In re J.W.*, *supra*, 26 Cal.App.5th at p. 268.) That the children have special needs and may require lifetime care "does not preclude a finding that [they are] likely to be adopted. [Citation.]" (*Ibid.*) Three of the children received regional center services. Reyna R. had received training in caring for children with special needs, had cared for the children for over three years, knew what their care entailed and continued to want to adopt them. The adoption had been approved. This is substantial evidence that the children are adoptable. (*In re K.B.*, *supra*, 173 Cal.App.4th at p. 1293.) "To deny [these children] the chance to permanently become . . . member[s] of the family that loves [them] and that [they] love[], simply because [they have] special needs, would derail the entire concept of permanent planning." (*In re J.W.*, *supra*, at pp. 268-269.)

DISPOSITION

The order is affirmed.
NOT TO BE PUBLISHED

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.